IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1838

JERRY PAUL,

Petitioner,

v.

ROBERT PLEASANTS, SHERIFF, WAKE COUNTY, RALEIGH, NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner Jerry Paul respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 2, 1977.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 551 F.2d 575, and 579, and appear in the Appendix infra at A18 and A24. The order denying rehearing and noting Judge Butzner's dissent therefrom appears in the Appendix infra at A37. The opinion of the district court is unreported, and is reproduced in the appendix at A13-A17.

The underlying contempt order entered in the state trial court in *State v. Joan Little*, No. 75 Cr 51778, (A1-A3), is unreported. The opinion of the North Carolina Court of Appeals (A4-A12) affirming the contempt judgment is reported *sub nom. In re Paul*, 28 N.C. App. 610, 222 S.E.2d 479 (1976). Further review was denied by the North Carolina Supreme Court without opinion, 289 N.C. 614, 223 S.E.2d 767 (1976).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 2, 1977. A timely petition for rehearing and suggestion that the case be reheard *en banc* was denied on March 31, 1977, and this petition for certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner, an attorney, served as defense counsel in a six week state murder trial. Following his client's acquittal, petitioner was held in contempt of court upon the basis of a single, brief episode that had occurred during *voir dire* examination of the jury. Petitioner's only notice of the contempt charges was provided by service upon him of a portion of the trial transcript, which showed that he had persisted in objecting to certain rulings of the trial court, rulings which had been prefaced by the announcement of the trial judge that "I am just busting up your [jury selection] system right now." Petitioner's objections included the allegations that the trial judge was biased in favor of the prosecution and was incapable of giving the defendant a fair trial, and resulted in reconsideration and ultimate reversal of the "busting up" order. At no time did the trial judge seek to curtail petitioner's arguments. Nor did the trial judge resort to or even mention his contempt powers in order to maintain order.

At the end of the trial, petitioner was held in contempt upon a general, undifferentiated finding, prepared *ex parte* by the

trial judge, which included specifications of the speech reflected in the transcript previously furnished to petitioner, and also assertions of the trial judge concerning the manner and motive of petitioner's conduct which were neither supported nor even suggested by the transcript. Petitioner did not receive notice of the latter assertions, nor did he receive an opportunity to be heard as to the correctness of the allegations prior to being held in contempt.

The state appellate court, which affirmed petitioner's conviction, disavowed reliance upon the unproven allegations of conduct, finding that the contempt judgment was based only upon the speech reflected in the transcript. A divided panel of the Court of Appeals for the Fourth Circuit, however, relied upon these unproven assertions of conduct in affirming the denial of petitioner's application for a writ of habeas corpus. In this setting, the questions presented are:

I. Whether petitioner was deprived of liberty without due process of law when he was convicted of contempt on the basis of a general finding that included (A) specifications of contempt which, as authoritatively construed by the state appellate court that affirmed his contempt conviction, consisted of constitutionally protected and proper conduct as an attorney, and (B) additional specifications as to which he was given neither notice nor an opportunity to be heard?

II. Whether petitioner was deprived of liberty without due process of law when, following the conclusion of a trial, he was convicted of contempt by the same judge who had been the object of petitioner's trial objections and supporting accusations of bias?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

...nor shall any State deprive any person of life, liberty or property, without due process of law...

STATEMENT OF THE CASE

Petitioner Jerry Paul, a North Carolina attorney was lead defense counsel in the highly publicized first degree murder[1] trial of Joan Little, a young black woman accused and acquitted of murdering her white, middle-aged jailer. Following the acquittal, the state trial judge held petitioner in contempt for speech and conduct which had allegedly occurred a month before during jury selection. (A1-A3.) The North Carolina Court of Appeals affirmed the contempt judgment. *In re Paul,* 28 N.C. App. 610, 222 S.E. 2d 479 (1976). After exhausting state remedies,[2] petitioner applied to the district court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[3] The petition was dismissed without a hearing. (A13-A17). The decision of the district court was affirmed by a divided panel of the United States Court of Appeals for the Fourth Circuit, 551 F.2d 575.

The colloquy underlying the contempt judgment is reproduced in full in the opinion of the dissenting judge below. (A25-A28.) This colloquy took place during jury selection, and was initiated by the announcement of the trial judge that "I am just busting up your [jury selection] system right now."

1. First degree murder was a capital crime at the time of Ms. Little's trial in August 1975 under N.C.G.S. 14-17, the mandatory statute subsequently found unconstitutional in *Woodson v. North Carolina,* 428 U.S. 280 (1976).

2. Further review was denied without opinion by the North Carolina Supreme Court, 289 N.C. 614, 223 S.E. 2d 767 (1976).

3. After serving five days of his fourteen day sentence, petitioner was released on bail per order of the North Carolina Court of Appeals. Petitioner's enlargement from custody has been continued by the federal courts to the present time, and nine days of the sentence remain to be served.

(A25.)[4] Following this announcement, petitioner responded to the invitation of the trial judge to speak (A25.), and pointed out the illogic of the "busting up" order, suggesting that the judge was favoring the prosecution. (A26.) Petitioner requested that the judge disqualify himself from further participation in the trial (A27), and noted that, to comply with state procedure, it would be necessary for him to continue to ask the proscribed questions in order to preserve possible error for review. (A27.) At this point, the trial judge stated that "I haven't said you couldn't ask the questions," (A28), and shortly thereafter the colloquy was concluded. The entire exchange took an estimated two and one-half minutes. (A28.) At its conclusion, the court said nothing about citing petitioner for contempt, and the defense was thereafter permitted to return to its original

4. From the outset, petitioner had sought to protect his client from a jury verdict based on prejudice. This concern was appropriate. His client faced a mandatory death penalty upon conviction. She was black, the deceased white. Ms. Little was in custody in an Eastern North Carolina jail following a felony conviction awaiting the outcome of her appeal. The victim was portrayed as a respectable law enforcement officer. Ms. Little claimed that she had killed her jailer while defending herself against sexual attack. The case had attracted enormous pre-trial publicity. Petitioner therefore undertook a several pronged effort to obtain a fair jury for his client. He filed motions in the trial court in Beaufort County where the case had arisen contending that a jury in that county, or in any other rural Eastern North Carolina County would be prejudiced and challenged the composition of the grand and petit jury lists. (See, Michael, et al., *Challenges to Jury Composition in North Carolina,* 7 N.C. Central L. J. 1 (1976), an article by several members of the Joan Little Jury Project describing the nature of the challenge to the jury lists.) After extensive hearings, the case was moved away from Eastern North Carolina entirely to Raleigh notwithstanding statutory provisions authorizing venue changes only to adjoining counties or counties within a judicial district. N.C.G.S. 15A-957. Petitioner also successfully requested that the trial court depart further from the normal practice by having jurors examined individually outside of the presence of the others because of the likely difficulty in selecting an unbiased jury. Finally, with the assistance of the social scientists working with the Jury Project, petitioner had carefully developed a series of questions to ask jurors designed to uncover prejudice or bias for this emotionally charged case. It was this system that the judge said he was "busting up" and which petitioner sought to defend.

selection system in the examination of subsequent jurors.[5]

The facts subsequent to this colloquy are fairly summarized by Judge Butzner, dissenting in the court below (A28-A32):

> When the court convened the next day on July 16, the judge said:
>
> > Now, yesterday, we had an incident which occurred in which statements were made by Mr. Paul. The Court finds as a fact that the following took place at 2:55 p.m., on July 15th, which was yesterday; and this is called instance number one in reference to Mr. Paul and I am now handing him a record, verbatim record from the transcript of just what you said yesterday. Hand that to him. That's the only comment I'm making about it. (Transcript handed to Mr. Paul identical to pages 9-14 of this Record.)[6]
>
> The state court record discloses that five days later the judge advised Paul that after the jury returned its verdict, he would be "cited for contempt for his statements in court on July 15, 1975."
>
> The state court record also recites:
>
> On August 9, 1975, [the judge] prepared the Contempt Order, upon which Jerome Paul was eventually imprisoned, and informed Paul he was leaving blank the number of days that the said Paul would have to serve in jail for being in contempt of court by his actions on July 15, 1975. [The judge] retained the Contempt Order in his possession until it was read by him in open Court after the jury returned with a verdict of not guilty in the Joan Little case on August 15, 1975.

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5. The majority below was mistaken in its observation that after the controversy on July 15, the trial court allowed "certain questions to at least be asked, but not answered." (A22.) The trial court not only permitted the questions but required, over objections by the State, that the questions be answered. Appendix United States Court of Appeals, p. A49.

6. The transcript does not include the prefatory comment of the trial judge about "busting up your system."

> On August 12, 1975, [the judge] advised Jerome Paul privately in chambers that the Court would permit and hear a statement by the said Jerome Paul in open court following the jury charge in the Joan Little case if the said Jerry Paul desired to make a statement in open court at that time relating to his actions in court on July 15, 1975. During this conversation [the judge] further informed Jerome Paul that he would be held in contempt on the previously referred to Contempt Order immediately after the jury verdict in the Joan Little case. . ..

On August 15, while the jury was considering its verdict, the trial judge offered Paul an opportunity to speak in his own defense. At this time, the only notice of any charges that Paul had received was the transcript of the incident that had occurred during the selection of the jury on July 15. Responding to these charges, Paul made a rambling statement acknowledging that he had spoken emotionally, but asserting that he did not speak with hatred or anger or to belittle or harm the trial judge. At the conclusion of his statement, the trial judge complimented him, and said nothing further about punishing him for contempt.

After the jury returned its verdict later in the day, the trial judge disclosed, for the first time, the contents of the order that he had prepared the previous week. He prefaced his reading of the order with this statement:

> I have a number of orders to enter; one involving Mr. Paul which I will enter at this time, and I'll give him a copy so he can follow me along. Haven't written in any amounts yet. That's for Mr. Paul.

Whereupon, the judge read the order holding Paul in contempt and sentencing him to jail. The order did not deal simply with the colloquy on July 15 during the selection of the jury. In addition, it adjudged Paul guilty of charges for which he had received no notice. For clarity, I have italicized these charges in the order below:

> *The Court finds as a fact that during the first day of trial of the case of State vs. Joan Little, on the 14th day of July, 1975, the Court directed Mr. Jerry Paul, Chief*

Counsel for the defendant, Joan Little, to sit down three times before the said Paul did so after a ruling of the court to which the said Jerry Paul was vocally objecting. The court then admonished the said Jerry Paul that when a court ruled it was a ruling of the court and further statements of counsel critical of the ruling were not in order.

The Court further finds as a fact that on the following day, July 15, 1975 at 2:55 o'clock p.m. when the court was hearing defense counsel, Jerry Paul, in the absence of the prospective juror Jenny Lancaster, in reference to the court's ruling on certain questions propounded to said juror by defense Jerry Paul. On that occasion Jerry Paul *in a very loud voice* stated that the court's rulings were denying the defendant an opportunity to effectively pick good jurors and to return to the method the court was suggesting was to return to a hundred years ago and made absolutely no sense whatsoever, at which time the court denied the defense counsel the right to ask certain questions in the manner put by defense counsel to which Jerry Paul answered *in a very loud voice* that any questions the state asked, they were allowed to ask, and the questions he wanted to ask were not being allowed to ask and that the court was showing bias in favor of the State and was not giving to the defense a fair trial. Thereafter, a conversation occurred betweeen the court and the defendant as to the method of asking questions during which time defense counsel, Jerry Paul, stated that the State was taking longer to examine jurors than the defense was taking.

The Court further finds as a fact that this statement as to time consumed by the State was not true at which time Jerry Paul answered that the reason the court was cutting him off was because the defendant was getting an advantage and the court was favoring the State and the court was proceeding in a manner to ensure Joan Little's conviction.

The Court further finds as a fact that the records amply disclose that this was not a true statement at which time the defense counsel, Jerry Paul, *in a voice indicating loud anger* asked the court to recuse himself because he didn't think that the court was capable of giving Joan Little a fair

trial and he didn't intend to sit or stand there and see an innocent person go to jail for any reason and that the court could threaten him with contempt or anything else but it did not worry him, at which time *Attorney Jerry Paul instantly turned his back to the court and in a loud voice addressed the News Media and others in the courtroom* and said "and to sit there and say like the queen of hearts off with the heads, the law is the law, is to take us back one hundred years," whereupon *Attorney Jerry Paul then turned back to the court* and said that he intended to ask the questions and said *in a loud voice* "it is apparent I'm disgusted with the whole matter, whole matter of ever bringing Joan Little to trial anyway". Thereafter he made further statements and at the completion of these statements the court inquired if he was through he stated "I am through for the moment but not through for this trial."

The Court finds as a fact that the statements made by the said Attorney Jerry Paul on said occasion *were in manner made to disrupt the trial and in an apparent attempt to force the court at that time to find him in contempt of court in order that a mistrial would result.*

The Court concludes from the above findings of fact that the *above acts* of Jerry Paul as set forth in these Findings of Fact are in direct contempt of this court.

The Court further concludes that in order to keep this trial in progress which was necessary in the ends of justice, this order was delayed until the Joan Little trial had been completed.

Now, therefore, it is ordered, adjudged and decreed that the said Attorney Jerry Paul is in direct contempt of court and he is hereby ordered in punishment therefor to be confined in the common jail of Wake County for a period of [illegible]en days.

[illegible]he 15th day of August, 1975 and 12:10 p.m. o'clock. Signed by me.

Immediately after signing the order, the judge asked:

Now, Mr. Paul, you've got a little medical problem, is

that bothering you?

MR. PAUL: Yes sir, that's correct.

THE COURT: When you want to start it, get it over as soon as –

MR. PAUL: If your Honor pleases, I would go ahead and get it over with. Could I make a statement?

THE COURT: Yes sir.

Paul then made a brief statement affirming his intense belief in the innocence of his client and emphasizing the necessity of his conduct "to make advances in courts and society." At the conclusion of his statement, the following proceedings took place:

THE COURT: All right. Thank you very much. Now, Mr. Paul realizes and I hope the News Media realizes that this is nothing personal between me as an individual and Mr. Paul because I personally have no animosity towards him whatsoever. This is a matter that I felt necessary in order to preserve the court decorum and I would have held him in contempt at that moment except we could not have tried the case – came at right time.

Now, you gentlemen can see me in chambers if you want to see –

MR. ROWAN [defense counsel]: No, sir. I believe going to have to be done in open court.

At this time we move in arrest of judgment of the contempt that you have just issued against Mr. Paul.

THE COURT: Motion denied.

MR. ROWAN: Yes. Move for impartial judge.

THE COURT: Motion denied.

MR. ROWAN: And we move for a jury trial.

THE COURT: Motion denied. Now, I've got to see you about another matter.

* * * *

The North Carolina Court of Appeals upheld the contempt judgment but carefully avoided reliance upon the trial court's findings regarding petitioner's conduct and intent, as set forth in italics at pp. 7-9, *ante*. The state appellate court held that "(a) written transcript provided formal notice of the specific actions for which petitioner was being cited." (A9) These "specific actions" were held to be contemptuous (A12), and petitioner's claims that he had not received a full and fair hearing before an impartial judge were rejected.

The federal court of appeals viewed the contempt judgment as based on the speech, along with petitioner's alleged conduct and intent. (A22) The majority nevertheless found that the transcript – which did not reflect any of this alleged conduct or intent – had provided petitioner with constitutionally adequate notice. (A22) The majority also concluded that a new judge was not required before petitioner could have been held in contempt. (A24) Judge Butzner disagreed on both grounds and filed a comprehensive dissenting opinion.[7]

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7. In concluding that the trial judge had become embroiled in a controversy with petitioner, Judge Butzner recognized (A34) that it was the trial judge who had initiated the controversy by announcing "I am just busting up your system right now." This portion of the colloquy was not included in the transcript furnished to petitioner as "notice." the brief proceedings leading up to the "busting up" order were as follows (A25):

BY MR. PAUL FOR THE DEFENSE:
Q. All right, do you take any magazines?
MR. GRIFFIN [the prosecutor]: OBJECTION.
COURT: SUSTAINED. I'm going to have to get right down to - I will rule on every time you object.

Q. Do you read much?

A. [prospective juror] Yes.
Q. All right, what do you read?

MR. GRIFFIN: OBJECTION.
COURT: OVERRULED.

A. Magazines and novels.

Re-hearing and a suggestion that the case be re-heard by the en banc court were denied, Judge Butzner again dissenting. (A37.)

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footnote 7 continued

Q. What type of magazines?

MR. GRIFFIN: OBJECTION.
COURT: SUSTAINED.

MR. PAUL: If your Honor please, may I approach the bench.
COURT: Yes sir.
(Counsel approach bench)

COURT: I am just busting up your system right now. All right madam, will you go back in the jury room.

(NOTE: [Juror] returns to a jury room).

REASONS FOR GRANTING THE WRIT

1. The decision below is contrary to *Taylor v. Hayes,* 418 U.S. 488 (1974), and its requirement that "before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf." *Id.* at 498-99. The departure of the decision below from *Taylor v. Hayes* is well stated in the dissenting opinion of Judge Butzner (A32-A34):

> In this case, the trial judge found it unnecessary to invoke his power to maintain order in the courtroom by summarily punishing, without notice or hearing, contemptuous conduct committed in his presence. Since conviction and punishment were properly delayed until the conclusion of the trial, the case is governed by the principles expressed in *Taylor v. Hayes,* 418 U.S. 488, 496-500, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974), and *Groppi v. Leslie,* 404 U.S. 496, 502-06, 92 S.Ct. 582, 30 L.Ed.2d 632 (1972). These cases teach that "before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf." 418 U.S. at 498-99, 94 S.Ct. at 2703. The state court record discloses that Paul was denied these fundamental elements of due process.

Paul's only notice of the charges was given on July 16 when the trial judge, cryptically referring to "instance number one in reference to Mr. Paul," handed him a copy of the transcript containing the July 15 colloquy. Paul, however, was not convicted and punished solely for what he said in this colloquy. The order adjudicating his guilt states that the court also found him in contempt because he refused to be seated on July 14, he falsely charged that the state took longer to examine jurors than the defense, he addressed the court in a loud, angry voice, he turned his back on the court to address the news media and others in the courtroom, and he acted with intent to create a mistrial. Since Paul was

punished at least in part for these transgressions, the lack of notice about them denied him due process. *Taylor v. Hayes*, 418 U.S. at 500, 94 S.Ct. 2697.

Because of the insufficient notice, Paul was also denied an adequate hearing. When he made the statement before he was sentenced, he did not know what conduct the trial judge considered contemptuous other than his statements during the July 15 colloquy. Consequently, he was unable to offer any defense, explanation, or apology concerning the other charges. After he completed his statement, the trial judge read the contempt order with its additional charges, and, without affording him further opportunity to respond, sentenced him to jail.

Granting Paul permission to make a statement after he was sentenced was not a substitute for an adequate hearing before punishment was imposed. Both Paul and the judge clearly considered the proceedings concluded when Paul was convicted and sentenced. The finality of the proceedings is confirmed by the judge's summary denial of the defense motions without even hearing arguments on their merits. Nothing in the record suggests that the judge was willing to reopen the case. Thus, the contempt proceeding violated due process because Paul was denied "an opportunity to be heard in defense before punishment [was] imposed." *Taylor v. Hayes*, 418 U.S. at 498, 94 S.Ct. at 2703, *quoting Groppi v. Leslie*, 404 U.S. at 502, 92 S.Ct. 582.

The ABA Standards Relating to the Function of the Trial Judge § 7.4 (App. Draft 1972) provide:

> Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

I believe that these recommendations succinctly state the minimal requirements of due process. See *Taylor v. Hayes*, 418 U.S. at 499 n.8, 94 S.Ct. 2697. Tested by this construction of the due process clause, Paul's conviction cannot stand.

To what Judge Butzner has said on this point, we add only

that the trial court's finding regarding what petitioner had intended – that he had sought "to force the court at that time to find him in contempt of court in order that a mistrial would result" (A2) – is exactly the sort of matter which must be fairly noticed for plenary hearing in contempt cases.[8] Petitioner, of course, had no notice that his intent was at issue.

2. The decision below overstepped the permissible bounds of federal habeas corpus review by disregarding the limitations of the contempt judgment imposed by the North Carolina Court of Appeals on direct review of that judgment.

The contempt judgment, as drafted by the trial judge, contains undifferentiated findings of speech, conduct and intent. Petitioner did not receive advance notice that his conduct and intent would be at issue; for that reason we presume, the North Carolina Attorney General filed a confession of error when the case was before the state appellate court.[9] The State court

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8. See, e.g., *United States v. Sacher*, 182 F.2d 416, 423, 430, 455 (2d Cir. 1950) [Specification I], *aff'd*, 343 U.S. 1 (1952); *Offutt v. United States*, 232 F.2d 69, 72 (D.C. Cir. 1956); *Widger v. United States*, 244 F.2d 103 (5th Cir. 1957); *Rollerson v. United States*, 343 F.2d 269 (D.C. Cir. 1964). Cf *Panico v. United States*, 375 U.S. 29 (1963).

9. In its "answer to petition for writ of certiorari" in the North Carolina Court of Appeals, the North Carolina Attorney General stated the following:

> Petitioner, Jerome Paul, contends that the Judge erred in finding Petitioner in contempt and in sentencing him to a term of fourteen (14) days in the Wake County Jail without giving Petitioner reasonable notice of the charge and an opportunity to be heard in defense before punishment was imposed. In support of this contention, Petitioner relies on the recent United States Supreme Court case of *Taylor v. Hayes*, 418 U.S. 488, 41 L. Ed.2d 897 (1974). The Attorney General is unable to distinguish that case from the facts presented in the matter now before the Court of Appeals.
>
> Based on the foregoing, the Attorney General does not oppose remand of this matter to a resident judge of the Wake County Superior Court for the issuance of an order that Petitioner show cause why he should not be held in contempt for the comments made by Petitioner on July 14 and July 15, 1975, to Judge Hamilton Hobgood at the Wake County Superior Court...

After the North Carolina Court of Appeals granted certiorari and directed further briefing, the State defended the contempt order in that court.

sought to avoid the problem of inadequate notice by limiting the contempt judgment to the "specific actions" set out in the transcript which had been furnished to petitioner in advance of the contempt judgment: [10] "A written transcript provided formal notice of the *specific actions* for which petitioner was being cited." (A9.) (emphasis supplied) This construction of the contempt judgment would have been binding upon this Court, *De Jonge v. Oregon*, 299 U.S. 353, 361-62 (1937), and should similarly have been binding upon the federal courts in considering petitioner's application for a writ of habeas corpus. Cf. *Lefkowitz v. Newsome*, 420 U.S. 283, 292 n. 9 (1975); *Wood v. Georgia*, 370 U.S. 375, 393-394 (1962).

By upholding the contempt judgment on the basis of conduct and intent not among the "specific actions" set out in that written transcript, the federal court of appeals was upholding a state conviction "upon a charge not made." *De Jonge v. Oregon, supra.* The scope of federal habeas corpus review should have been limited to determining whether the "specific actions" set out in the transcript sould be punished as contempt, and if so, whether petitioner had received the "process which is due." As we argued in the court below, these "specific actions" are permissible speech for an attorney in a criminal case.[11] and an unconditional writ of habeas corpus should have been issued.

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10. This still would not be adequate notice: In order to prepare a defense, an alleged contemnor must receive actual notice of the "alleged misconduct with particularity." *In re Gault*, 387 U.S. 1, 33 (1967); *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970); *Wolff v. McDonnell*, 418 U.S. 539, 563-64 (1974). Merely furnishing the alleged contemnor with a transcript leaves unspecified which words are thought to be contemptuous and the manner in which this speech impeded the judicial proceedings.

11. At best, the contempt order is based on petitioner's "attempt to commit contempt." There is no finding that petitoner had actually disrupted the trial; instead, the ultimate finding is only that petitioner spoke "in manner made to disrupt the trial and in an apparent attempt to force the court at that time to find him in contempt of court in order that a mistrial would result." (A2.) This "attempted contempt" was unsuccessful because the trial was not disrupted. Thus, there was no "obstruction to

3. The trial court's adjudication of contempt rests upon a general and undifferentiated finding that includes constitutionally protected conduct as well as conduct that may be constitutionally unprotected, and therefore the contempt order must fall as a whole.

We have just shown (paragraph 2 *supra)* that the speech thought objectionable by the trial judge and which provided the only basis for the affirmance of the petitioner's conviction by the North Carolina Court of Appeals was protected advocacy. We have also shown (paragraph 1, *supra*) that the trial court's finding of contempt included, without differentiation, this protected speech as well as conduct which may not be protected but about which petitioner had neither notice nor opportunity to be heard.

Since at least *Stromberg v. California*, 283 U.S. 359, 367-368 (1931), the rule has been that a criminal conviction cannot stand upon a general finding upon a charge that includes both

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footnote 11 continued:
the performance of judicial duty," the *sine qua non* of the contempt power. *Ex Parte Hudgings*, 249 U.S. 378, 383 (1919).

Petitioner's request that the judge disqualify himself could not be contemptuous. *Holt v. Virginia*, 381 U.S. 131 (1965); *In re Little*, 404 U.S. 553 (1972). Nor could petitioner's stated intent to continue to ask seemingly prohibited questions be punished as contempt. *In re McConnell*, 370 U.S. 230 (1962). Petitioner did not persist in arguments after a clear ruling – the only rulings made by the trial judge were "I am just busting up your system, right now," and several invitations to continue speaking. (A25-A27.) Everything said by petitioner was preceded by an invitation by the trial judge for further comment or argument.

Engaging in conduct upon official invitation cannot later be judged criminal. *Raley v. Ohio*, 360 U.S. 423, 437-440 (1959); *Cox v. Lousiana*, 379 U.S. 559, 570-572 (1965).

What the Court stated in *In re McConnell* is applicable here:

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. 370 U.S. at 236.

Petitioner "created no such obstacle here," and his speech cannot, therefore, amount to a contempt of court.

constitutionally protected and constitutionally unprotected activity. *Street v. New York*, 394 U.S. 576, 585-588 (1969); *Bachellar v. Maryland*, 397 U.S. 564, 569-571 (1970). This general rule has been specifically applied to contempt cases. *Thomas v. Collins*, 323 U.S. 516 (1945). The wisdom of the constitutional principle which forbids sustaining a conviction on a combination of permissible and impermissible findings is uniquely exemplified in this case by the subsequent history of petitioner's treatment by the appellate courts – with the North Carolina Court of Appeals upholding his conviction upon one ground and the Fourth Circuit on another.

4. In addition to having received inadequate notice, and consequently having been denied a reasonable opportunity to be heard, petitioner was entitled to a hearing before a new judge. As Judge Butzner explained in his dissenting opinion below (A34-36), the conclusion of the majority that a new judge was not constitutionally required is contrary to *Taylor v. Hayes*, *supra*, and *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

CONCLUSION

In prior cases, the Court has zealously safeguarded "the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling.[12] The claim pressed by petitioner was neither farfetched nor untenable, and resulted in the reconsideration of an adverse ruling. His client was ultimately found not-guilty. Just as "defendants cannot be left to the mercies of incompetent counsel,"[13] so too defense attorneys cannot be left to the mercies of judges who confuse "offenses to their sensibilities with obstruction to the administration of justice." *Brown v. United States*, 356 U.S. 148, 153 (1958).

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12. *Sacher v. United States*, 343 U.S. 1, 9 (1952).

13. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

For these reasons, it is respectfully submitted that certiorari be granted to reverse the decision of the court of appeals.

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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAKE COUNTY, NORTH CAROLINA

STATE OF NORTH CAROLINA,	)	
	)	
-vs-	)	No. 75-CR-51778
	)	
JOAN LITTLE,	)	
	)	
Defendant.	)	

CONTEMPT ORDER

The Court finds as a fact that during the first day of trial of the case of State vs. Joan Little, on the 14th day of July, 1975, the Court directed Mr. Jerry Paul, Chief Counsel for the defendant, Joan Little, to sit down three times before the said Paul did so after a ruling of the court to which the said Jerry Paul was vocally objecting. The court then admonished the said Jerry Paul that when a court ruled it was a ruling of the court and further statements of counsel critical of the ruling were not in order.

THE COURT FURTHER FINDS AS A FACT that on the following day, July 15, 1975 at 2:55 o'clock P.M. when the court was hearing defense counsel, Jerry Paul, in the absence of the prospective juror Jenny Lancaster, in reference to the court's ruling on certain questions propounded to said juror by defense Jerry Paul. On that occasion Jerry Paul in a very loud voice stated that the court's rulings were denying the defendant an opportunity to effectively pick good jurors and to return to the method the court was suggesting was to return to a hundred years ago and made absolutely no sense whatsoever, at which time the court denied the defense counsel the right to ask certain questions in the manner put by defense counsel to which Jerry Paul answered in a very loud voice that any questions the state asked, they were allowed to ask, and the questions he wanted to ask were not being allowed to ask and that the court was showing bias in favor of the State and was not giving to the defense a fair trial. Thereafter. a conversation occurred between the court and the defendant as to the method of

asking questions during which time defense counsel, Jerry Paul, stated that the State was taking longer to examine jurors than the defense was taking.

THE COURT FURTHER FINDS AS A FACT that this statement as to time consumed by the State was not true at which time Jerry Paul answered that the reason the court was cutting him off was because the defendant was getting an advantage and the court was favoring the State and the court was proceeding in a manner to ensure Joan Little's conviction.

THE COURT FURTHER FINDS AS A FACT that the records amply disclose that this was not a true statement at which time the defense counsel Jerry Paul in a voice indicating loud anger asked the court to recluse itself because he didn't think that the court was capable of giving Joan Little a fair trial and he didn't intend to sit or stand there and see an innocent person go to jail for any reason and that the court could threaten him with contempt or anything else but it did not worry him, at which time Attorney Jerry Paul instantly turned his back to the court and in a loud voice addressed the News Media and others in the court room and said "and to sit there and say like the queen of hearts off with the heads, the law is the law, is to take us back one hundred years," whereupon attorney Jerry Paul then turned back to the court and said that he intended to ask the questions and said in a loud voice "it is apparent I'm disgusted with the whole matter, whole matter of ever bringing Joan Little to trial anyway". Thereafter he made further statements and at the completion of these statements the court inquired if he was through and he stated "I am through for the moment but not through for this trial".

THE COURT FINDS AS A FACT that the statements made by the said Attorney Jerry Paul on said occasion were in manner made to disrupt the trial and in an apparent attempt to force the court at that time to find him in contempt of court in order that a mistrial would result.

The Court Concludes from the above findings of fact that the above acts of Jerry Paul as set forth in these Findings of Fact are in direct contempt of this court.

THE COURT FURTHER CONCLUDES that in order to keep this trial in progress which was necessary in the ends of justice,

this Order was delayed until the Joan Little trial had been completed.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED

that the said Attorney Jerry Paul is in direct contempt of court and he is hereby ordered in punishment therefor to be confined in the common jail of Wake County for a period of *14* days.

This the *15th* day of August, 1975, at *12:00 PM* o'clock.

/s/ Hamilton H. Hobgood
JUDGE PRESIDING

IN THE
NORTH CAROLINA COURT OF APPEALS

IN THE MATTER OF:)
JEROME PAUL) No. 7510SC855

(Filed March 3, 1976)

ON *writ of certiorari* to review order entered by *Hobgood, Judge.* Order entered 15 August 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 11 February 1976.

At the conclusion of a murder trial over which he presided, Judge Hamilton Hobgood found petitioner, a lawyer, to be in direct contempt of court for remarks which petitioner had made earlier during the course of jury selection. The court entered judgment and made findings of fact as follows:

"The Court finds as a fact that during the first day of trial . . . on the 14th day of July, 1975, the Court directed Mr. Jerry Paul, Chief Counsel for the defendant, . . . to sit down three times before the said Paul did so after a ruling of the court to which the said Jerry Paul was vocally objecting. The court then admonished the said Jerry Paul that when a court ruled it was a ruling of the court and further statements of counsel critical of the ruling were not in order.

The Court further finds as a fact that on the following day, July 15, 1975 at 2:55 o'clock p.m. when the court was hearing defense counsel, Jerry Paul, in the absence of the prospective juror Jenny Lancaster, in reference to the court's ruling on certain questions propounded to said juror by defense Jerry Paul. On that occasion Jerry Paul in a very loud voice stated that the court's rulings were denying the defendant an opportunity to effectively pick good jurors and to return to the method the court was suggesting was to return to a hundred years ago and made absolutely no sense whatsoever, at which time the court denied the defense counsel the right to ask certain questions in the manner put by defense counsel to which Jerry Paul answered in a very loud voice that any questions the state asked, they were allowed to ask, and the questions he

wanted to ask were not being allowed to ask and that the court was showing bias in favor of the State and was not giving to the defense a fair trial. Thereafter, a conversation occurred between the court and the defendant as to the method of asking questions during which time defense counsel, Jerry Paul, stated that the State was taking longer to examine jurors than the defense was taking.

The Court further finds as a fact that this statement as to time consumed by the State was not true at which time Jerry Paul answered that the reason the court was cutting him off was because the defendant was getting an advantage and the court was favoring the State and the court was proceeding in a manner to ensure . . . [defendant's] conviction.

The Court further finds as a fact that the records amply disclose that this was not a true statement at which time the defense counsel, Jerry Paul, in a voice indicating loud anger asked the court to recluse [sic] himself because he didn't think that the court was capable of giving . . . [defendant] a fair trial and he didn't intend to sit or stand there and see an innocent person go to jail for any reason and that the court could threaten him with contempt or anything else but it did not worry him, at which time Attorney Jerry Paul instantly turned his back to the court and in a loud voice addressed the News Media and others in the courtroom and said 'and to sit there and say like the queen of hearts off with the heads, the law is the law, is to take us back one hundred years,' whereupon Attorney Jerry Paul then turned back to the court and said that he intended to ask the questions and said in a loud voice 'it is apparent I'm disgusted with the whole matter, whole matter of ever bringing . . . [the defendant] to trial anyway.' Thereafter he made further statements and at the completion of these statements the court inquired if he was through he stated 'I am through for the moment but not through for this trial.'

The Court finds as a fact that the statements made by the said Attorney Jerry Paul on said occasion were in manner made to disrupt the trial and in an apparent attempt to force the court at that time to find him in contempt of court in order that a mistrial would result.

The Court concludes from the above findings of fact that the above acts of Jerry Paul as set forth in these

Findings of Fact are in direct contempt of this court.

The Court further concludes that in order to keep this trial in progress which was necessary in the ends of justice, this Order was delayed until the . . . [defendant's] trial had been completed.

Now, therefore, it is ordered, adjudged and decreed that the said Attorney Jerry Paul is in direct contempt of court and he is hereby ordered in punishment therefor to be confined in the common jail of Wake County for a period of fourteen days.

This the 15th day of August, 1975 and 12:10 p.m. o'clock."

On 20 August 1975, a Writ of Certiorari was issued by this Court to review the contempt order and judgment of imprisonment, and petitioner was released pending review by this Court.

Attorney General Edmisten, by Senior Deputy Attorney General Andrew A. Vanore, Jr., and Associate Attorney General Joan Byers.

Paul, Keenan, Rowan and Galloway, by James E. Keenan, James V. Rowan and Karen Bethea Galloway, for defendant appellant.

District Attorney Burley B. Mitchell, Jr., Tenth Prosecutorial District, Kyle S. Hall, Assistant District Attorney and Joyce A. Hamilton, Assistant District Attorney, for amicus curiae.

ARNOLD, Judge.

The U. S. Supreme Court held in *Taylor v. Hayes,* 418 U.S. 488, 41 L.Ed. 2d 897, 94 S.Ct. 2697 (1974), that due process safeguards must be extended to persons cited for direct contempt of court in cases where final adjudication and sentencing for the contemptuous conduct is delayed until after trial.

"We are not concerned here with the trial judge's power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him. [Citation omitted.] The usual justification of necessity [citation omitted] is not nearly so cogent when final adjudication and sentence are postponed until after trial. Our decisions establish that summary punishment need not always be imposed

during trial if it is to be permitted at all. In proper circumstances, particularly where the offender is a lawyer representing a client on trial, it may be postponed, until the conclusion of the proceedings. [Citation omitted.]. . . .

On the other hand, where conviction and punishment are delayed, 'it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable [the court] to proceed with its business.' . . . Groppi [*Groppi v. Leslie,* 404 U.S. 496, 30 L.Ed. 2d 632, 92 S.Ct. 582 (1972)] counsels that before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. This is not to say, however, that a full scale trial is appropriate." *Taylor v. Hayes, supra,* at 497-499.

2. One of the questions presented by this appeal is whether the due process requirements of (1) reasonable notice and (2) an opporunity to be heard were provided to petitioner. From the record the following facts appear to be pertinent to this issue:

(1) The findings of contempt resulted from an incident which occurred on July 15, 1975, during the jury selection.

(2) The petitioner was given a verbatim transcript on 16 July 1975 of the previous day's incident from which the finding of contempt resulted. This transcript was given the petitioner in open court and findings of fact were made by the presiding judge that the incident took place at 2:55 p.m. on July 15, and stated ". . . this is called instance number one in reference to Mr. Paul and I am now handing him a record, verbatim record from the transcript of just what you said yesterday."

(3) On 21 July 1975, Judge Hobgood advised petitioner in chambers that immediately upon return of a jury verdict in the murder trial the petitioner would be cited for contempt for his statements in court on 15 July 1975.

(4) On 12 August 1975, Judge Hobgood explicitly advised petitioner in chambers that the court would permit and hear a statement by petitioner in open court relating to his actions on 15 July 1975.

(5) On 15 August 1975, petitioner was given an opportunity to be heard, and he made the following statement:

"MR. PAUL: I would sort of respond to your Honor, if I might. If your Honor pleases, even though I tried cases before you before, I didn't get to know you too good.

THE COURT: We got to know each other better in this trial.

MR. PAUL: Better in this trial. And I hope that both of us and all of us have grown more than—more as human beings and understanding each other. Realize we have had disagreements. I hope that out of those disagreements have come growth as human beings that lead us towards understanding in reaching what is the truth.

Myself, I'm what you call an advocate or believer of nonviolence and basically of Dr. King's philosophy, as most of the people on the defense team are. And it is with this philosophy we proceed through life. This philosophy we speak out at people when we think they are wrong, but we do not do so because we just dislike them, dislike them out of hatred; do not do so to make them—to belittle them or to hurt them in any way; we do so only in order to call attention to particular issues of dialogue in a trial like this.

I, myself, your Honor, am very emotionally involved and feel very strongly about this young lady. And I would do—would give up a great deal for her, because as Dr. Flynn so aptly put it, you—he—you could not have rode back that night with her and believed that she was anything but innocent.

And your Honor, I've spent a long time in this State fighting for social change and sometimes I do become emotional and outspoken, heated. And that heat is not hatred, and that heat is not spoken in anger or to belittle or to hurt any one else. Sometimes it is necessary that we speak out knowing that others will become angry at us, so that through anger that will cause a dialogue or a thought process and will perhaps result in growth.

And if it is necessary for a person, who lives under Dr. King's philosophy, to call upon themselves punishment

or harshness because of speaking out, then they know what they're doing, that; and they accept that gladly, but they at no time hate or despise or dislike the other person or the person they were talking to. And they also hope that out of that grows the dialogue which results in a better understanding.

I realize that your Honor and I have had words back and forth, and I hope that depth of nonviolence, that out of that has grown a better understanding of each other's position and that you realize that words were not said in an attempt to belittle or an attempt to harm you in any way, but maybe you can—maybe you cannot understand my life style of nonviolence. I hope that you can and hope that we made progress on that, but I know that we have talked about that and think that we now understand each other a little better. And certainly can say that for my part that I have come to appreciate your good qualities better than I did, because I know of them because of that incident. I cannot speak for you.

THE COURT: Well, I'll say to you I like you and I think you are a good lawyer. That's for publication."

The due process requirements of notice and opportunity to be heard were adequately met. Petitioner received actual notice, including the time and place, that he would be cited for contempt. A written transcript provided formal notice of the specific actions for which petitioner was being cited.

Moreover, petitioner was given advance notice that he would have an opportunity to be heard, and in fact he was heard. The U. S. Supreme Court said in *Taylor v. Hayes, supra* at 499, that "the contemnor might at least urge, for example, that the behavior at issue was not contempt but the acceptable conduct of an attorney representing his client; or, he might present matters in mitigation or otherwise attempt to make amends with the court." This is essentially the nature of the argument petitioner undertook to make to the court.

Petitioner's next argument is that he was entitled to have an unbiased judge rule on the contempt charge, and that it was error for the trial judge not to recuse himself. We see no merit in this argument.

In *Taylor v. Hayes, supra*, it was found that the trial judge became embroiled in a running controversy with petitioner and displayed an unfavorable personal attitude toward petitioner,

his ability, and his motives. It was held that the contempt issue should have been decided by a different judge.

However, we see the instant case as being more like that of *Ungar v. Sarafite*, 376 U.S. 575, 11 L.Ed. 2d 921, 84 S.Ct. 841 (1964), cited in the *Taylor* case wherein the court stated, "but we were impressed there with the fact that the judge 'did not purport to proceed summarily during or at the conclusion of the trial, but gave notice and afforded an opportunity for a hearing which was conducted dispassionately and with a decorum befitting a judicial proceeding.'" *Taylor v. Hayes, supra*, at 503.

That Judge Hobgood did not react strongly to petitioner's conduct emerges clearly in the following statements which the Judge made at the conclusion of the trial and prior to sentencing petitioner:

> "I have to say about counsel, I think highly of all of them. I think that the counsel has fought the case with intensity; State's counsel and defense counsel. Mr. Paul and myself will probably have some more matters to take care of because—well, we will discuss that later. But Mr. Paul is a very good lawyer and a very intense lawyer. He fights very hard and intensely for his client.
>
> This is not the first time I've had Mr. Paul right in this same courtroom before on previous occasions.
>
> Incidentally, you won the case."

After finding petitioner in contempt and passing sentence the following conversation occurred:

> "THE COURT: You understand nothing personal between you and me, don't you?
>
> MR. PAUL: Yes, sir. And if saying things in order to make advances in courts and society and create social change, and if doing what I did resulted in . . . [defendant] going free or any way contributed to that, then I do not consider time as any dishonor but as a badge of honor and note Dr. King said we turn jail walls into jails of freedom.
>
> THE COURT: All right. Thank you very much. Now, Mr. Paul realizes and I hope the News Media realizes that this is nothing personal between me as individual and Mr. Paul because I personally have no animosity towards him whatsoever. This is a matter that I felt necessary in order to preserve the court decorum and I would have held him in contempt at that moment except we could not have tried the case. . . ."

Finally, as has already been quoted, following petitioner's statement Judge Hobgood stated, "Well, I'll say to you I like you and I think you are a good lawyer. That's for publication."

From our reading of the record before us it is clear that there were no "marked personal feelings" or "personal stings" on behalf of the trial judge, nor was there "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Ungar v. Sarafite, supra*, at 588; *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L.Ed. 2d 532, 91 S.Ct. 499 (1971).

We conclude that there was no error in the failure of the trial judge to recuse himself.

Petitioner admits that his remarks were "certainly contentious and persistent" but maintains that they were not contemptuous. He asserts that his comments were invited by the trial judge, and furthermore that he was within the scope of vigorous advocacy and not interrupting court proceedings or disobeying any court directive. We disagree.

The record shows that petitioner went beyond the bounds of an attorney's vigorous advocacy on behalf of his client. Due to the forbearance and self-control of the trial judge there was only a minimal interruption of the trial proceedings caused by petitioner's actions. However, the conduct of the petitioner would have greatly obstructed the court in the performance of its duties had it not been for the judge's self-restraint.

As an attorney, petitioner knew, or should have known, not to persist in making arguments after the court made its rulings. Moreover, the findings of fact by the trial judge show that petitioner had been specifically forewarned that further statements by counsel were not in order after the court made its rulings.

There is no evidence in the record to support petitioner's position that the court invited his remarks. Nor is there anything in the record to indicate that the judge badgered or provoked petitioner in any manner that would have prompted petitioner's actions.

That petitioner knew his remarks were contemptuous is reflected by his statement that it would not worry him to be held in contempt. By his words and demeanor it is shown that petitioner intended to be contemptuous, and the record supports the finding that his acts and conduct did amount to contempt.

We have considered petitioner's final arguments that G.S. 5-1(1) is unconstitutional in that it is vague and denies him due process, and that G.S. 5-5 is unconstitutional on its face and violates due process of law. His arguments are not persuasive. See *State v. Little*, 175 N.C. 743, 94 S.E. 680 (1917) (as to G.S. 5-1(1)), and *In re Williams*, 269 N.C. 68, 152 S.E. 2d 317 (1967) (as to G.S. 5-5).

The "standards of proper courtroom decorum are not altered and should not be applied differently because a trial may be characterized as political. . . ." *United States v. Seale*, 461 F. 2d 345, 367 (1972). "The court is not a public hall for the expression of views, nor is it a political arena or a street. It is a place for trial of defined issues in accordance with law and rules of evidence, with standards of demeanor for court, jurors, parties, witnesses and counsel." Matter of *Katz v. Murtagh*, 28 N.Y. 2d 234, 240, 321 N.Y.S. 2d 104, 269 N.E. 2d 816 (1971).

The order of contempt and judgment of confinement is affirmed. Having served approximately five of the fourteen day sentence petitioner must now serve the remaining nine days of the sentence. Execution for confinement of the contemnor for the remainder of the term of imprisonment pronounced by Judge Hobgood shall issue at the next session of Superior Court for Wake County following the certification of this opinion.

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

JERRY PAUL, Petitioner	)	
v.	)	No. 75-0268-HC
ROBERT PLEASANTS, Sheriff, Wake County, Respondent.	)	

MEMORANDUM DECISION

In this application for a writ of habeas corpus petitioner challenges the validity of an order adjudging him in direct contempt of the Superior Court of Wake County. Petitioner was retained counsel for Joan Little who was on trial for first degree murder, and the contempt charge resulted from certain statements made by petitioner in open court on July 15, 1975, during jury selection in said case. On August 15, 1975, at the conclusion of the trial, petitioner was adjudged in direct contempt of said court and was ordered confined in the Wake County Jail for a period of 14 days.

Petitioner filed an application for a writ of habeas corpus in the Wake County Superior Court on August 15, 1975, which was denied. Petitioner then sought review of the contempt order by writ of certiorari in the North Carolina Court of Appeals. Certiorari was granted and said contempt order was affirmed on March 3, 1976. *In re Paul*, 28 N.C. App. 610 (1976). A petition for discretionary review in the North Carolina Supreme Court under N.C.G.S. § 7A-31 was denied on April 6, 1976.

Petitioner advances the following allegations in support of his application for a writ of habeas corpus: (1) he was not given adequate notice of the charges and an opportunity to be heard prior to being adjudged in contempt of court in violation of due process; (2) he was entitled to have an impartial judge rule on the contempt charge since a controversy existed between petitioner and the presiding judge; (3) petitioner's conduct did not in fact constitute direct contempt; and (4) N.C.G.S. § 5-1(1), the

statutory enumeration of the various forms of direct contempt, is unconstitutional on its face and unconstitutional as applied to the facts of this case in that the statute has a chilling effect on forceful advocacy.

The following pertinent facts appear in the record filed in the North Carolina Court of Appeals *In the Matter of: Jerome Paul,* and incorporated in petitioner's amendment to the application for writ of habeas corpus filed in this court:

(1) On July 14, 1975, the first day of the trial of the case of *State v. Joan Little,* the court directed petitioner to sit down three times before said petitioner did so after a ruling to which petitioner was vocally objecting. The court then admonished petitioner that when a court ruled it was a ruling of the court and further statements of counsel critical of the ruling were not in order. [R. p.24]

(2) The adjudication of contempt resulted from statements by petitioner in open court on July 15, 1975. [R. pp. 24-26].

(3) On July 16, 1975, in open court, petitioner was given a verbatim transcript of his statements of the previous day which resulted in the contempt sanction, and the presiding judge stated "that the following took place at 2:55 p.m., on July 15th...this is called instance number one in reference to Mr. Paul and I am now handing him a record, verbatim record from the transcript of just what you said yesterday..." [R. p.16-17]

(4) On July 21, 1975, the court advised petitioner privately in chambers that immediately upon the return of a jury verdict in the case petitioner would be cited for contempt for his statements in court on July 15, 1975. [R. p. 18].

(5) On August 9, 1975, the court prepared the contempt order and informed petitioner that it was leaving blank the number of days that petitioner would have to serve in jail for being in contempt of court by his actions on July 15, 1975. [R. p. 18].

(6) On August 12, 1975, the court advised petitioner privately in chambers that the court would permit and hear in open court following the jury charge a statement by petitioner

relating to his actions in open court on July 15, 1975. [R. pp. 18-19].

(7) Petitioner was given the opportunity and did in fact make a statement in open court on August 15, 1975, following the court's charge to the jury. [R. pp. 21-23].

It is well established that a court has inherent power to punish summarily, without notice and hearing, a contemnor for contemptuous conduct committed in its presence. *Sacher v. United States,* 343 U.S.1, 72 S.Ct. 451 (1952), *Taylor v. Hayes,* 418 U.S. 488, 94 S.Ct. 2697 (1974). However, in cases where final adjudication and sentencing for contemptuous conduct committed during the course of a trial is delayed until after the trial, the United States Supreme Court has held that the contemnor is entitled to the rudimentary due process safeguards of notice of the charge and an opportunity to be heard. *Taylor v. Hayes, supra.* "This is not to say, however, that a full-scale trial is appropriate," *Taylor v. Hayes, supra,* 418 U.S. at p. 499, 94 S.Ct. at p. 2703.

Due process is a flexible concept and does not lend itself to any particular mode of procedure. As stated by the United States Supreme Court in *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 70 S.Ct. 652 (1950),

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case."* (emphasis added)

Mullane, supra, 339 U.S. at p. 313, 70 S.Ct. at pp. 656-657.

The contemnor in the instant case is not a layman but an attorney. As an attorney, he is required to know and observe the standards of professional conduct as defined in the codes and canons of the legal profession and further bound to conduct himself in such a manner as to avoid disorder and disruption in the courtroom. He should know when his conduct ceases to be proper and becomes contemptuous. The court is of the opinion that when petitioner received from the court on July 16, 1975, a verbatim transcript of his statements made in open court the preceding day, and when the court specifically informed him

on July 21, 1975, that he would be cited for contempt for his statements of July 15, 1975, petitioner was given adequate notice of the contempt charge. Furthermore, petitioner was given an opportunity to be heard and was in fact heard in open court on August 15, 1975. The court finds that the presiding judge's decision to delay the contempt proceedings until the close of the trial, in order to avoid disruption of the progress of the trial and any prejudice to the rights of petitioner's client, was proper under the circumstances and violated none of petitioner's constitutional rights.

The record does not support petitioner's second allegation that the contempt proceeding should have been heard by another judge because of the controversy between petitioner and the presiding judge. There was no actual bias on the part of the presiding judge nor did he become so embroiled in a controversy with petitioner that he "was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Ungar v. Sarafite*, 376 U.S. 575, 588, 84 S.Ct. 841, 849 (1964). The comments of the court prior to its adjudging petitioner in direct contempt are devoid of any bias and both the court and the petitioner denied any personal animosity between them. [R. pp.19, 23, and 27]. Thus, recusal and assignment of the contempt proceeding to another judge was not required.

Petitioner alleges that his conduct in open court on July 15, 1975, did not in fact constitute direct contempt. However, the court finds that petitioner's statements in the Wake County Superior Court on July 15, 1975, as contained in the record, were contemptuous and exceeded the permissible bounds of professional conduct and vigorous advocacy. A court cannot tolerate any disruption of court proceedings. There are certain elementary standards of proper conduct which must be observed by attorneys as officers of the court which were not met in the instant case.

Petitioner's allegation that the North Carolina contempt statute is unconstitutional is without merit. N.C.G.S. § 5-1 (1) is neither unconstitutional on its face nor unconstitutional as applied to petitioner's actions. Clearly, the North Carolina courts have both an inherent and statutory right to punish for

contempt and enumeration of the various forms of contempt by the North Carolina legislature is neither vague nor overly broad.

NOW, THEREFORE,

IT IS ORDERED that judgment be entered dismissing petitioner's application for a writ of habeas corpus.

This 12th day of May, 1976.

/s/ Algernon L. Butler
SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JERRY PAUL,
Petitioner-Appellant,

vs

ROBERT PLEASANTS,
Sheriff, Wake County,
Raleigh, North Carolina,
Respondent-Appellee

No. 76-1734

OPINION

(Filed March 2, 1977)

Before BUTZNER, WIDENER and HALL, Circuit Judges.

K. K. HALL, Circuit Judge:

Jerry Paul, a North Carolina attorney, and appellant, was lead defense counsel in the highly publicized murder prosecution of Joan Little, a young black accused and acquitted of murdering her middle-aged white jailor. Following the acquittal, the trial judge held appellant in contempt of court and sentenced him to serve fourteen days in jail for conduct which occurred during the course of jury selection.

Appellant promptly sought habeas corpus relief in the Wake County Superior Court, but relief was denied. The Court of Appeals of North Carolina granted review but affirmed the decision below. *In re Paul*, 28 N.C.App. 610, 222 S.E.2d 479 (1976). The North Carolina Supreme Court denied discretionary review. *In re Paul*, 289 N.C. 614, 223 S.E.2d 767 (1976).

Concurrent with the state appeals, appellant had filed and, following the denial of the state appeal, pressed his application for a writ of federal habeas corpus pending in district court in the Eastern District of North Carolina. The federal habeas corpus application asserted the same errors which were set forth but rejected in the state appeals. Relief was denied on May 12, 1976, a certificate of probable cause to appeal was granted, and this appeal followed.

Appellant sets forth four grounds for reversal, namely:

(1) his conduct during *voir dire* was noncontemptuous and constitutionally protected; (2) assuming his conduct was contemptuous, he did not receive adequate notice and an opportunity to be heard prior to sentencing in violation of due process; (3) a hearing should have been held prior to a determination that the conduct was found to be contemptuous; and (4) the contempt matter should have been referred to a different judge for disposition. Not assigned by appellant on appeal here and raised only by amicus curiae and therefore deemed abandoned was the contention that N.C.G.S. § 5-1(1), the contempt statute, was unconstitutional. We affirm.

I.

THE CONTEMPT

On July 14, 1975, prior to the individual examination of the prospective jurors on *voir dire*, the trial judge specifically admonished appellant against vocally continuing to object in a critical fashion once the court had ruled on a particular matter. See: *In re Paul*, 28 N.C.App. 610, 222 S.E.2d 479, 480 (1976). Nevertheless, on July 15, 1975, during the individual examination of a prospective juror, appellant, who already had spent extensive time on *voir dire*, persisted in objecting to what he believed to be an unwarranted narrowing of the scope of the admittedly non-traditional *voir dire* when certain state objections were sustained. The trial court noted that defense counsel had made an adequate record for appellate purposes, suggested he move to continue his broad "non-traditional" method of *voir dire*, which was done, and the court thereafter denied the motion.

Appellant still persisted in criticizing the court's ruling asserting that the court was biased, that the court's ruling made no sense and that the judge was deliberately favoring the state. Appellant concluded as follows:

> MR. PAUL: And at this point we ask your Honor to recluse [sic] yourself because I don't think you are capable of giving Joan Little a fair trial and I don't intend to sit or stand here and see an innocent person go to jail for any reason and you can threaten me with contempt or anything else, but it does not worry me.

COURT: All right, you got that in the record.

MR. PAUL: And to sit there and say like the queen of hearts off with the heads because the law is the law is to take us back a hundred years.

COURT: All right.

MR. PAUL: And we intend to ask these questions. Now your Honor, they can object and you can sustain, but we intend to keep on asking these questions and in order for the appellate court to rule whether or not they were proper questions we have to ask the questions. It is apparent I'm quite disgusted with the whole matter, whole matter of ever bringing Joan Little to trial anyway. There has been one roadblock after another and one attempt after another to railroad Joan Little and I am tired of it. Now we intend to ask these questions and you can sustain the objections if you want to but the appellate court cannot make a ruling on whether or not they were proper questions unless the questions are asked.

COURT: All right, you have said that twice. I haven't said you couldn't ask the questions.

MR. PAUL: And the appellate courts cannot make a judgment on whether or not the questions would have been relevant unless they get the witness' answer into the record.

COURT: Well, I'll pass on that. Are you through?

MR. PAUL: I'm through for the moment but not through for this trial.

The day after this incident, the court furnished appellant with a verbatim transcript of his remarks from the previous day and, on July 21, 1975, advised appellant that he would be cited for contempt following the jury verdict. Appellant was informed that the contempt order was prepared on August 9, 1975, and on August 12, 1975, was told that the court would hear a statement from him following the jury charge. The court again informed appellant that the contempt citation would be issued after the verdict.

On August 15, 1975, the court gave appellant the opportunity to speak on two occasions in his own behalf. First, after the jury was charged, the trial judge complimented all counsel including appellant who then presented a philosophical explanation to the court regarding non-violence and his strong emo-

tional attachment to the case at bar. He candidly admitted his emotional state, his outspokenness, and his fervor for what he believed was correct. He did not deny the contemptuous statements.

The jury returned with its verdict and was discharged, whereafter the judge rendered his findings of fact and conclusions of law regarding the contempt. See *In re Paul*, 28 N.C.App. 610, 222 S.E.2d 479, 480-481 (1976) for a full recitation of the findings. The court then found that appellant had disregarded the court's admonition not to continue to vocally criticize the court's rulings once rendered, and addressed the court in a loud, angry, and disrespectful manner, and indeed had even turned his back to the court and addressed the news media in the courtroom in a loud voice when, as above-quoted, appellant analogized the court to the tyrannical queen in *Alice in Wonderland*. The court also found that the statements were made in a disruptive manner and were an apparent attempt to force the court to declare a mistrial.

The trial judge nevertheless assured appellant that he harbored no personal animosity towards him, but that the contempt citation was necessary to preserve courtroom decorum and gave appellant a second opportunity to address the court. This colloquy centered again on the emotion of the trial, and constituted virtual acquiescence by appellant in the likely incarceration to follow which he designated as a "badge of honor."

We agree with the Court of Appeals of North Carolina and the district court below that appellant's conduct clearly exceeded the bounds of vigorous advocacy. The conduct would have been disruptive absent the self-restraint exercised by the court. Appellant had been expressly warned by the judge not to continue his vocal criticisms of the court's rulings once rendered, yet persisted. We further agree with the Court of Appeals of North Carolina that the trial court did not "invite" appellant's disrespect. Nothing indicates that the court "badgered" or "provoked" appellant. To the contrary, appellant quite clearly informed the court that it would not "worry him" to be held in contempt. See *In re Paul*, 28 N.C.App. 610, 618-619, 222 S.E.2d 479, 484-485 (1976).

Appellant contends that his conduct constituted vigorous and effective advocacy constitutionally protected by the First, Fifth, Sixth, and Fourteenth Amendments. He argues that when the trial judge announced he was "busting up" (i.e. terminating the broad *voir dire* examination) that he did nothing more than respectfully request reconsideration by the court of that adverse ruling. Appellant adds that his conduct was effective advocacy since the court partially reversed its ruling on the scope of *voir dire* allowing certain questions to at least be asked, but not answered.

We find no constitutional infirmity in the contempt citation. If the trial court's ruling regarding the narrowing of the scope of permissible *voir dire* was unclear, the remedy was to seek clarification of the ruling at the time – not to continue to argue with the court after the ruling, express personal disgust with the very trial itself, and turn one's back on the court to make speeches to the news media in a loud, disrespectful and angry voice. Conduct of this nature has long been expressly condemned. *Maness v. Meyers,* 419 U.S. 449, 458-459, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975); *Sacher v. United States,* 343 U.S. 1, 9, 72 S.Ct. 451, 96 L.Ed. 717 (1952); See also: ABA Standards Relating to the Administration of Criminal Justice, The Defense Function § 7.1(a), (c) and (d) (Approved Draft, 1971).

II.

DUE PROCESS

Appellant contends that even if his conduct was contemptuous he did not receive adequate notice of the charges against him nor an opportunity to be heard prior to sentencing in violation of due process. As above-noted, appellant was given a verbatim transcript of the remarks the court found objectionable, was informed twice when the contempt citation would occur, and was also informed of and twice exercised his right to address remarks to the issue of contempt. The final speech by appellant came *after* the court had made findings of fact and conclusions of law regarding the contempt. Appellant at no time quarreled with the court's contempt finding, and at no time ever asked for a particularization thereof, but rather

seemed to expect the citation and simply sought to justify it on a philosophical basis. Due process was satisfied. *Taylor v. Hayes,* 418 U.S. 488, 498-499, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974). See also *In re Meckley,* 137 F.2d 310 (3rd Cir. 1943).

III.

THE HEARING ISSUE

Appellant contends that where a direct contempt occurs in the presence of the court but the entry of the order is delayed until the conclusion of a trial, due process requires that a hearing be held *prior* to a determination that the acts in question are contemptuous. At most, appellant urges that he was accorded a hearing solely as to mitigation of punishment but not as to guilt or innocence.

As above-noted, appellant was given *two* opportunities to address the court regarding the contempt issue – after the jury retired, and then again after the verdict was returned and the court had rendered its findings of fact and conclusions of law. At neither hearing did appellant deny what had occurred nor did he seek to controvert the facts found by the trial court. No denial was registered that the conduct constituted legal contempt. Appellant apparently was content to rely upon his philosophical arguments to the court.

Postponing the hearings held on appellant's contempt citation until the conclusion of the trial coupled with notification of the charges against him and the dual opportunity given appellant to speak in his own behalf satisfied due process. A full scale trial was not required. *Taylor v. Hayes, supra,* at 498, 499, 94 S.Ct. 2697..

IV.

JUDICIAL DISQUALIFICATION

Appellant contends that the trial judge who found appellant in contempt had become "embroiled" in the controversy with appellant and was "prejudiced" against appellant since he had already found him "guilty" of the contempt prior to any hearings held. Therefore, he argues it was error for the judge not

to recuse himself.

Both the Court of Appeals of North Carolina and the district court below found no evidence that the trial judge was "embroiled" in a controversy with appellant nor was the trial judge "...unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Ungar v. Sarafite,* 376 U.S. 575, 588, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964); *Mayberry v. Pennsylvania,* 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); *In re Paul, supra,* 222 S.E.2d at 484. Compare: *Taylor v. Hayes, supra,* 418 U.S. at 501-504, 94 S.Ct. 2697. To the contrary, the trial judge was not only unbiased but also was complimentary of appellant's efforts at trial, commended him publically, and expressly based his contempt finding on the necessity for the preservation of "court decorum," and then only after appellant had made two statements of his position for the record.

With regard to the asserted "prejudice," under *Taylor v. Hayes, supra* and *Sacher v. United States, supra,* a court may permissibly make a finding that a direct contempt occurred in the presence of the court, yet subject that finding to later reconsideration, as obviously occurred here when the contemnor exercises his right of allocution. We perceive no error in the conduct of the trial court.

The judgment of the district court is affirmed, and the case remanded to the district court for dissolution of the stay of execution of sentence.

AFFIRMED.

BUTZNER, Circuit Judge, dissenting:

I dissent because the procedure utilized to convict Jerome Paul of criminal contempt does not comport with the requirements of the due process clause. Paul was entitled to reasonable notice of the specific charges against him and to a hearing before an impartial judge. Since he was denied these fundamental rights, I would grant the writ of habeas corpus, conditioned on the right of the state to retry him within a reasonable time.

I

Paul was counsel for Joan Little, who was acquitted of murdering a prison guard. The incident on which the state chiefly relies to sustain Paul's conviction occurred during the examination of jurors at the start of the trial on July 15. One of the prospective jurors was a woman employed by the North Carolina Department of Corrections. She acknowledged that she had read about the case in the newspaper, but had not formed an opinion. Paul then questioned her about her reading habits, particularly as to magazines. The following colloquy ensued:

BY MR. PAUL FOR THE DEFENSE:

Q. All right, do you take any magazines?

MR. GRIFFIN [the prosecutor]: OBJECTION.

COURT: SUSTAINED. I'm going to have to get right down to – I will rule on every time you object.

Q. Do you read much?

A. Yes.

Q. All right, what do you read?

MR. GRIFFIN: OBJECTION.

COURT: OVERRULED.

A. Magazines and novels.

Q. What type of magazines?

MR. GRIFFIN: OBJECTION.

COURT: SUSTAINED.

MR. PAUL: If your Honor please, may I approach the bench.

COURT: Yes sir.

(Counsel approach bench)

COURT: I am just busting up your system right now. All right madam, will you go back in the jury room.

(NOTE: [Juror] returns to a jury room.)

COURT: All right, I'll hear you now.

MR. PAUL: If your Honor please, there is no reason that we should be bound to the traditional way of picking the jury.

COURT: Probably isn't, but that's exactly what we are going to do as from this minute on.

MR. PAUL: If your Honor please, to do that denies us due process and denies us the opportunity to effectively pick good jurors.

COURT: All right now do you want to put that in the records? I suppose you are taking that down (addressing court reporter).

MR. PAUL: We have developed a method of selecting the best jurors. For the Court to ignore the advances made in social sciences and other sciences, the aid in selecting fair jurors, is to return to a hundred years ago and makes absolutely no sense whatsover.

COURT: I believe if it is necessary the Appellate Court has, in the last day, from you, a broad spectrum of your questions, you know, of what you're trying to do. I have my doubts – I had my doubts about it yesterday morning, but I wanted to give you full opportunity to present it, for possible appellate review. Now I want you to move to the Court, which you are now doing, that you be allowed to continue as you have started, which you are now doing.

MR. PAUL: That's what we're doing now.

COURT: All right, denied.

MR. PAUL: If your Honor please, any questions the State asks, they are allowed to ask. I think the Court has shown bias in this case in favor of the State.

COURT: All right, you can put that in the record.

MR. PAUL: And isn't giving us a fair trial.

COURT: All right, I'll let you put that in the record.

MR. PAUL: And there is no sense in the Court not allowing us to proceed in an orderly fashion when we have not disrupted the Court and we have not prolonged the examination. Our questions are only phrased in a little bit different way. Our questions take shorter time than the State's do.The only difference is our questions are not traditional.

COURT: That's right.

MR. PAUL: And that being the only difference.

COURT: No, it is not that, because I think the record will disclose the type of questions and the length it has taken. I will let the record speak for that.

MR. PAUL: The time that we have kept on it shows the State has taken longer in examining jurors than we have.

COURT: I don't agree with that.

MR. PAUL: We have evidence that it has and that they have taken longer.

COURT: All right, anything else you want to say?

MR. PAUL: The only reason I can see that your Honor is now cutting us off is because we are gaining an advantage and your honor is favoring the State and your Honor is proceeding in such a manner to insure Joan Little's conviction.

COURT: All right, you got that in the rocord.

MR. PAUL: And at this point we ask your Honor to recuse yourself because I don't think you are capable of giving Joan Little a fair trial and I don't intend to sit or stand here and see an innocent person go to jail for any reason and you can threaten me with contempt or anything else, but it does not worry me.

COURT: All right, you got that in the record.

MR. PAUL: And to sit there and say like the queen of hearts off with the heads because the law is the law is to take us back a hundred years.

COURT: All right.

MR. PAUL: And we intend to ask these questions. Now your Honor, they can object and you can sustain, but we intend to keep on asking the questions and in order for the appellate court to rule whether or not they were proper questions we have to ask the questions. It is apparent I'm quite disgusted with the whole matter, whole matter of ever bringing Joan Little to trial anyway. There has been one roadblock after another and one attempt after another to railroad Joan Little and I am tired of it. Now we intend to ask these questions and you can sustain the objections if you want to but the appellate court cannot make a ruling on whether or not they were proper

questions unless the questions are asked.

COURT: All right, you have said that twice. I haven't said you couldn't ask the questions.

MR. PAUL: And the appellate courts cannot make a judgment on whether or not the questions would have been relevant unless they get the witness' answer into the record.

COURT: Well, I'll pass on that. Are you through?

MR. PAUL: I'm through for the moment but not through for this trial.

COURT: Yes sir. All right, let the jurors return to the courtroom.

The entire exchange took an estimated two and one-half minutes. At its conclusion, the court said nothing about citing Paul for contempt, and the selection of the jury resumed without further incident.

When the court convened the next day on July 16, the judge said:

> Now, yesterday, we had an incident which occurred in which statements were made by Mr. Paul. The Court finds as a fact that the following took place at 2:55 p.m., on July 15th, which was yesterday; and this is called instance number one in reference to Mr. Paul and I am now handing him a record, verbatim record from the transcript of just what you said yesterday. Hand that to him. That's the only comment I'm making about it. (Transcript handed to Mr. Paul identical to pages 9-14 of this Record.)

The state court record discloses that five days later the judge advised Paul that after the jury returned its verdict, he would be "cited for contempt for his statements in court on July 15, 1975."

The state court record also recites:

> On August 9, 1975, [the judge] prepared the Contempt Order, upon which Jerome Paul was eventually imprisoned, and informed Paul he was leaving blank the number of days that the said Paul would have to serve in jail for being in contempt of court by his actions on July 15, 1975. [The judge] retained the Contempt Order in his possession until it was

> read by him in open Court after the jury returned with a verdict of not guilty in the Joan Little case on August 15, 1975.
>
> On August 12, 1975, [the judge] advised Jerome Paul privately in chambers that the Court would permit and hear a statement by the said Jerome Paul in open court following the jury charge in the Joan Little case if the said Jerry Paul desired to make a statement in open court at that time relating to his actions in court on July 15, 1975. During this conversation [the judge] further informed Jerome Paul that he would be held in contempt on the previously referred to Contempt Order immediately after the jury verdict in the Joan Little case.

On August 15, while the jury was considering its verdict, the trial judge offered Paul an opportunity to speak in his own defense. At this time, the only notice of any charges that Paul had received was the transcript of the incident that occurred during the selection of the jury on July 15. Responding to these charges, Paul made a rambling statement acknowledging that he had spoken emotionally, but asserting that he did not speak with hatred or anger or to belittle or harm the trial judge. At the conclusion of his statement, the trial judge complimented him, and said nothing further about punishing him for contempt.

After the jury returned its verdict later in the day, the trial judge disclosed, for the first time, the contents of the order that he had prepared the previous week. He prefaced his reading of the order with this statement:

> I have a number of orders to enter; one involving Mr. Paul which I will enter at this time, and I'll give him a copy so he can follow me along. Haven't written in any amounts yet. That's for Mr. Paul.

Whereupon, the judge read the order holding Paul in contempt and sentencing him to jail. The order did not deal simply with the colloquy on July 15 during the selection of the jury. In addition, it adjudged Paul guilty of charges for which he had received no notice. For clarity, I have italicized these charges in the order below:

> *The Court finds as a fact that during the first day of trial of the case of State vs. Joan Little, on the 14th day of July,*

1975, the Court directed Mr. Jerry Paul, Chief Counsel for the defendant, Joan Little, to sit down three times before the said Paul did so after a ruling of the court to which the said Jerry Paul was vocally objecting. The court then admonished the said Jerry Paul that when a court ruled it was a ruling of the court and further statements of counsel critical of the ruling were not in order.

The Court further finds as a fact that on the following day, July 15, 1975 at 2:55 o'clock p.m. when the court was hearing defense counsel, Jerry Paul, in the absence of the prospective juror Jenny Lancaster, in reference to the court's ruling on certain questions propounded to said juror by defense Jerry Paul. On that occasion Jerry Paul *in a very loud voice* stated that the court's rulings were denying the defendant an opportunity to effectively pick good jurors and to return to the method the court was suggesting was to return to a hundred years ago and made absolutely no sense whatsoever, at which time the court denied the defense counsel the right to ask certain questions in the manner put by defense counsel to which Jerry Paul answered *in a very loud voice* that any questions the state asked, they were allowed to ask, and the questions he wanted to ask were not being allowed to ask, and that the court was showing bias in favor of the State and was not giving to the defense a fair trial. Thereafter, a conversation occurred betweeen the court and the defendant as to the method of asking questions during which time defense counsel, Jerry Paul, stated that the State was taking longer to examine jurors than the defense was taking.

The Court further finds as a fact that this statement as to time consumed by the State was not true at which time Jerry Paul answered that the reason the court was cutting him off was because the defendant was getting an advantage and the court was favoring the State and the court was proceeding in a manner to ensure Joan Little's conviction.

The Court further finds as a fact that the records amply disclose that this was not a true statement at which time the defense counsel, Jerry Paul, *in a voice indicating loud anger* asked the court to recuse himself because he didn't think that the court was capable of giving Joan Little a fair trial and he didn't intend to sit or stand there and see an innocent person

go to jail for any reason and that the court could threaten him with contempt or anything else but it did not worry him, at which time *Attorney Jerry Paul instantly turned his back to the court and in a loud voice addressed the News Media and others in the courtroom* and said "and to sit there and say like the queen of hearts off with the heads, the law is the law, is to take us back one hundred years," whereupon *Attorney Jerry Paul then turned back to the court* and said that he intended to ask the questions and said *in a loud voice* "it is apparent I'm disgusted with the whole matter, whole matter of ever bringing Joan Little to trial anyway." Thereafter he made further statements and at the completion of these statements the court inquired if he was through he stated "I am through for the moment but not through for this trial."

The Court finds as a fact that the statements made by the said Attorney Jerry Paul on said occasion *were in manner made to disrupt the trial and in an apparent attempt to force the court at that time to find him in contempt of court in order that a mistrial would result.*

The Court concludes from the above findings of fact that the *above acts* of Jerry Paul as set forth in these Findings of Fact are in direct contempt of this court.

The Court further concludes that in order to keep this trial in progress which was necessary in the ends of justice, this order was delayed until the Joan Little trial had been completed.

Now, therefore, it is ordered, adjudged and decreed that the said Attorney Jerry Paul is in direct contempt of court and he is hereby ordered in punishment therefor to be confined in the common jail of Wake County for a period of fourteen days.

This the 15th day of August, 1975 and 12:10 p.m. o'clock. Signed by me.

Immediately after signing the order, the judge asked:

Now, Mr. Paul, you've got a little medical problem, is that bothering you?

MR. PAUL: Yes sir, that's correct.

THE COURT: When you want to start it, get it over as soon as –

MR. PAUL: If your Honor pleases, I would go ahead and get it over with. Could I make a statement?

THE COURT: Yes sir.

Paul then made a brief statement affirming his intense belief in the innocence of his client and emphasizing the necessity of his conduct "to make advances in courts and society." At the conclusion of his statement, the following proceedings took place:

THE COURT: All right. Thank you very much. Now, Mr. Paul realizes and I hope the News Media realizes that this is nothing personal between me as an individual and Mr. Paul because I personally have no animosity towards him whatsoever. This is a matter that I felt necessary in order to preserve the court decorum and I would have held him in contempt at that moment except we could not have tried the case – came at right time.

Now, you gentlemen can see me in chambers if you want to see –

MR. ROWAN [defense counsel]: No, sir. I believe going to have to be done in open court.

At this time we move in arrest of judgment of the contempt that you have just issued against Mr. Paul.

THE COURT: Motion denied.

MR. ROWAN: Yes. Move for impartial judge.

THE COURT: Motion denied.

MR. ROWAN: And we move for a jury trial.

THE COURT: Motion denied. Now, I've got to see you about another matter.

II

In this case, the trial judge found it unnecessary to invoke his power to maintain order in the courtroom by summarily punishing, without notice or hearing, contemptuous conduct committed in his presence. Since conviction and punishment were properly delayed until the conclusion of the trial, the case is governed by the principles expressed in *Taylor v. Hayes*, 418

U.S. 488, 496-500, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974), and *Groppi v. Leslie*, 404 U.S. 496, 502-506, 92 S.Ct. 582, 30 L.Ed.2d 632 (1972). These cases teach that "before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf." 418 U.S. at 498-99, 94 S.Ct. at 2703. The state court record discloses that Paul was denied these fundamental elements of due process.

Paul's only notice of the charges was given on July 16 when the trial judge, cryptically referring to "instance number one in reference to Mr. Paul," handed him a copy of the transcript containing the July 15 colloquy. Paul, however, was not convicted and punished solely for what he said in this colloquy. The order adjudicating his guilt states that the court also found him in contempt because he refused to be seated on July 14, he falsely charged that the state took longer to examine jurors than the defense, he addressed the court in a loud, angry voice, he turned his back on the court to address the news media and others in the courtroom, and he acted with intent to create a mistrial. Since Paul was punished at least in part for these transgressions, the lack of notice about them denied him due process. *Taylor v. Hayes*, 418 U.S. at 500, 94 S.Ct. 2697.

Because of the insufficient notice, Paul was also denied an adequate hearing. When he made the statement before he was sentenced, he did not know what conduct the trial judge considered contemptuous other than his statements during the July 15 colloquy. Consequently, he was unable to offer any defense, explanation, or apology concerning the other charges. After he completed his statement, the trial judge read the contempt order with its additional charges, and, without affording him further opportunity to respond, sentenced him to jail.

Granting Paul permission to make a statement after he was sentenced was not a substitute for an adequate hearing before punishment was imposed. Both Paul and the judge clearly considered the proceedings concluded when Paul was convicted and sentenced. The finality of the proceedings is confirmed by the judge's summary denial of the defense motions without even hearing arguments on their merits. Nothing in the record suggests that the judge was willing to reopen the case. Thus, the

contempt proceeding violated due process because Paul was denied "an opportunity to be heard in defense before punishment [was] imposed." *Taylor v. Hayes*, 418 U.S. at 498, 94 S.Ct. at 2703, quoting *Groppi v. Leslie*, 404 U.S. at 502, 92 S.Ct. 582.

The ABA Standards Relating to the Function of the Trial Judge § 7.4 (App. Draft 1972) provide:

> Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

I believe that these recommendations succinctly state the minimal requirements of due process. See *Taylor v. Hayes*, 418 U.S. at 499 n.8, 94 S.Ct. 2697. Tested by this construction of the due process clause, Paul's conviction cannot stand.

III

Furthermore, Paul was entitled to a hearing before another judge. In contempt proceedings, a judge exercises power unmatched by any other public official; he alone acts as prosecutor, witness, and adjudicator. Recognizing that this authority must be tempered with calm detachment, the Supreme Court has held that another judge should conduct contempt proceedings when (a) the trial judge becomes embroiled in a controversy with the contemnor, or (b) the contemnor personally attacks the trial judge. *Taylor v. Hayes*, 418 U.S. at 501-03, 94 S.Ct. 2697; *Mayberry v. Pennsylvania*, 400 U.S. 455, 463-66, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971). Each reason sustains Paul's claim for the appointment of a substitute judge.

The trial judge became personally embroiled in the controversy over Paul's method of jury selection when he announced at the beginning of the bench conference, "I am just busting up your system right now." The judge's attitude toward Paul was further revealed when he told Paul on August 12, before hearing his defense, that Paul would be held in contempt when the jury returned its verdict. These remarks indicate a lack of the fair and impartial adjudication that *Taylor* seeks to preserve.

Even if the trial judge were not disqualified because of his

own conduct, a substitute judge would be required because of Paul's personal attack on the judge. In response to the trial judge's announcement about "busting up" his system, Paul charged that the ruling showed bias. He accused the judge with proceeding so as to assure the defendant's conviction and demanded that he recuse himself because of his inability to conduct a fair trial. He then likened the judge to the Queen of Hearts, saying "off with the heads," and he referred to one attempt after another "to railroad" the defendant.

In the face of this attack, the trial judge exercised commendable restraint. The Supreme Court, however, has held that, regardless of the judge's reaction, a substitute judge is required when the contemnor makes "an insulting attack upon the integrity of the judge." *Mayberry v. Pennsylvania*, 400 U.S. at 465, 91 S.Ct. at 505, *quoting Ungar v. Sarafite*, 376 U.S. 575, 584, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964). Paul's accusation that the judge would assure the defendant's conviction because of his bias against her was an attack on the judge's impartiality and integrity. *United States v. Meyer*, 462 F.2d 827, 844-45 (D.C.Cir. 1972). Indeed, the state itself insists that Paul's remarks were an insulting attack on the judge. Therefore, the contempt charges, which were based in part on these remarks, should have been tried by another judge in order to conform with the standards of due process prescribed by *Mayberry*, 400 U.S. at 465, 91 S.Ct. 499.

It may well be that the trial judge had no actual bias and that he acted with complete impartiality. Even so, he should have recused himself. Addressing this problem, the Supreme Court has said:

> [T]he inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused....Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less... *Taylor v. Hayes*, 418 U.S. at 501, 94 S.Ct. at 2704.

I do not condone Paul's conduct. The ability of our adversary system to achieve justice is dependent, in part, upon the courtesy, dignity, and decorum of trial lawyers. Nevertheless, the constitutionality of Paul's conviction depends on proof of an imminent threat to the administration of justice. *In re Little*, 404 U.S. 553, 555, 92 S.Ct. 659, 30 L.Ed.2d 708 (1972). Because Paul was denied procedural due process, his guilt cannot be determined on the basis of the record before us. I believe the writ should issue, conditioned on Paul being granted a hearing before another judge after reasonable notice of the specific charges against him.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(TITLE OMITTED IN PRINTING)

ORDER DENYING REHEARING

Upon consideration of the petition for rehearing and of the suggestion for rehearing *en banc;*

Now, therefore, with the concurrence of Judge Widener and in the absence of a request for a poll of the entire court, as provided by Appellate Rule 35 (b),

It is ADJUDGED and ORDERED that the petition be, and the same hereby is, denied. Judge Butzner would grant the petition to rehear for the reasons stated in his dissent.

DATED: March 31, 1977

/s/ K.K. Hall
United States Circuit Judge

Petitioner

v.

Respondent

BRIEF OF THE RESPONDENT,
ROBERT PLEASANTS,
IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

ROY A. COOPER, III
ATTORNEY GENERAL OF
NORTH CAROLINA

Counsel for Robert Pleasants,
Respondent

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TABLE OF CASES

IN THE

Supreme Court of the United States

October Term, 1977
No. 76-1838

JERRY PAUL,
Petitioner

v.

ROBERT PLEASANTS,
Sheriff, Wake County,
Raleigh, North Carolina
Respondent

BRIEF OF THE RESPONDENT,
ROBERT PLEASANTS,
Sheriff, Wake County,
Raleigh, North Carolina
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion below is JERRY PAUL v. ROBERT PLEASANTS, Sheriff, Wake County, Raleigh, North Carolina, 551 F2d 575 (4 Cir 1977) which affirms the order of Honorable Algernon Butler (75-0268-HC EDNC 1976), unreported. A copy of both are included in the Petition, pp A13, A18 respectively.

JURISDICTION

The jurisdiction of the Court has been invoked pursuant to 28 USCA, Section 1254(1); and the petition was filed within the statutory ninety days from March 31, 1977, the date of the

order denying rehearing on the order, review of which is sought.

QUESTIONS PRESENTED

1. WAS THE NOTICE OF PETITIONER'S CONTEMPT CONSTITUTIONALLY ADEQUATE?
2. WAS THE TRIAL JUDGE REQUIRED TO RECUSE HIMSELF?

STATEMENT OF THE CASE

On July 15, 1975, the *voir dire* of prospective jurors in a North Carolina murder case, State v. Joan Little, was progressing. During the examination of the thirteenth juror, Jennie Lancaster, the episode at the base of this petition occurred. The state passed the juror, an employee of the Department of Correction, and the defense then questioned her. During the questioning, the trial judge, Honorable Hamilton Hobgood, appeared to register some dismay at the questions asked and indicated that he thought the defense was taking too much time. A defense member then claimed that defense had taken one hour and forty-five minutes as opposed to the state having taken one hour and fifty-four minutes. The judge registered surprise at this. To this point, the defense questions had involved such matters as whether Ms. Lancaster would attend her college again if she had it to do over; how she felt about her department's rehabilitation program; whether her income was more or less than $7,500.00 a year; and whether she gave any type of tests to prisoners. The judge, however, permitted questioning to continue and after the matters of pre-trial publicity and participation in social and religious organizations were delved into by the defense, the prospective juror was then asked about her reading habits and the following ensued:

"BY MR. PAUL FOR THE DEFENSE:

Q. All right, do you take any magazines?

MR. GRIFFIN: OBJECTION.

COURT: SUSTAINED. I'm going to have to get right down to — I will rule on every time you object.

Q. Do you read much?

A. Yes.

Q. All right, what do you read?

MR. GRIFFIN: OBJECTION.

COURT: OVERRULED.

A. Magazines and novels.

Q. What type of magazines?

MR. GRIFFIN: OBJECTION.

COURT: SUSTAINED.

MR. PAUL: If your Honor please, may I approach the bench.

COURT: Yes sir.

(Counsel approach bench)

COURT: I am just busting up your system right now. All right madam, will you go back to the jury room.

(NOTE: Miss Lancaster returns to a jury room.)

COURT: All right, I'll hear you now.

MR. PAUL: If your Honor please, there is no reason that we should be bound to the traditional way of picking the jury.

COURT: Probably isn't, but that's exactly what we are going to do as from this minute on.

MR. PAUL: If your Honor please, to do that denies us due process and denies us the opportunity to effectively pick good jurors.

COURT: All right now do you want to put that in the

record? I suppose you are taking that down (addressing court reporter)

MR. PAUL: We have developed a method of selecting the best jurors. For the Court to ignore the advances made in social sciences and other sciences, the aid in selecting fair jurors, is to return to a hundred years ago and makes absolutely no sense whatsoever.

COURT: I believe if it is necessary the Appellate Court has, in the last day, from you, a broad spectrum of your questions, you know, of what you're trying to do. I have my doubts — I had my doubts about it yesterday morning, but I wanted to give you full opportunity to present it, for possible appellate review. Now I want you to move to the Court, which you are now doing, that you be allowed to continue as you have started, which you are now doing.

MR. PAUL: That's what we're doing now.

COURT: All right, denied.

MR. PAUL: If your Honor, please, any questions the State asks, they are allowed to ask. I think the Court has shown bias in this case in favor of the State.

COURT: All right, you can put that in the record.

MR. PAUL: And isn't giving us a fair trial.

COURT: All right, I'll let you put that in the record.

MR. PAUL: And there is no sense in the Court not allowing us to proceed in an orderly fashion when we have not disrupted the Court and we have not prolonged the examination. Our questions are only phrased in a little bit different way. Our questions take shorter time than the State's do. The only difference is our questions are not traditional.

COURT: That's right.

MR. PAUL: And that being the only difference.

COURT: No, it is not that, because I think the record will disclose the type of questions and the length it has taken. I will let the record speak for that.

MR. PAUL: The time that we have kept on it shows the State has taken longer in examining jurors than we have.

COURT: I don't agree with that.

MR. PAUL: We have evidence that it has and that they have taken longer.

COURT: All right, anything else you want to say?

MR. PAUL: The only reason I can see that your Honor is now cutting us off is because we are gaining an advantage and your Honor is favoring the State and your Honor is proceeding in such a manner to insure Joan Little's conviction.

COURT: All right, you got that in the record.

MR. PAUL: And at this point we ask your Honor to recluse [*sic*] yourself because I don't think you are capable of giving Joan Little a fair trial and I don't intend to sit or stand here and see an innocent person go to jail for any reason and you can threaten me with contempt or anything else, but it does not worry me.

COURT: All right, you got that in the record.

MR. PAUL: And to sit there and say like the queen of hearts off with the heads because the law is the law is to take us back a hundred years.

COURT: All right.

MR. PAUL: And we intend to ask these questions. Now your Honor, they can object and you can sustain, but we intend to keep on asking the questions and in order for the appellate court to rule whether or not they were proper

questions we have to ask the questions. It is apparent I'm quite disgusted with the whole matter, whole matter of ever bringing Joan Little to trial anyway. There has been one roadblock after another and one attempt after another to railroad Joan Little and I am tired of it. Now we intend to ask these questions and you can sustain the objections if you want to but the appellate court cannot make a ruling on whether or not they were proper questions unless the questions are asked.

COURT: All right, you have said that twice. I haven't said you couldn't ask the questions.

MR. PAUL: And the appellate courts cannot make a judgment on whether or not the questions would have been relevant unless they got the witness' answer into the record.

COURT: Well, I'll pass on that. Are you through?

MR. PAUL: I'm through for the m o m e n t but not through for this trial.

COURT: Yes sir. All right, let the jurors return to the courtroom.

PROSPECTIVE JUROR LANCASTER RESUMES WITNESS STAND.

The following day, Judge Hobgood gave petitioner a record of the above, found as a fact that it occurred, and described it as "instance number 1 in reference to Mr. Paul", but said no more about it in Court. On July 21, 1975, the judge advised petitioner that he would be cited for contempt on the return of the verdict for his statements above. On August 9, 1975, Judge Hobgood prepared the order and informed petitioner that the number of days had been left blank. On August 12, 1975, the judge advised petitioner he would hear a statement on the matter from petitioner, if petitioner desired, after the jury had retired.

When the jury retired, Judge Hobgood praised counsel, stating petitioner was "a very good lawyer . . . a very intense lawyer" and told him he had won the case. He then asked if petitioner "want[ed] to say something before . . .", whereupon petitioner broke in and in effect stated that his actions were not taken out of dislike or belittlement but only as a part of a dialogue of growth, and then went on to state:

> "And if it is necessary for a person, who lives under Dr. King's philosophy, to call upon themselves punishment or harshness because of speaking out, then they know what they're doing, that; and they accept that gladly, but they at no time hate or despise or dislike the other person or the person they were talking to. And they also hope that out of that grows the dialogue which results in a better understanding."

The judge then stated he liked petitioner and referred to him again as "a good lawyer", saying it was "for publication".

When the jury returned a verdict of not guilty, petitioner asked to speak, was allowed to, and said to the Court and jury ". . . we first thank God and we thank you". The Court then read the contempt citation as follows:

> "The Court finds as a fact that during the first day of trial of the case of State vs. Joan Little, on the 14th day of July, 1975, the Court directed Mr. Jerry Paul, Chief Counsel for the defendant, Joan Little, to sit down three times before the said Paul did so after a ruling of the court to which the said Jerry Paul was vocally objecting. The court then admonished the said Jerry Paul that when a court ruled it was a ruling of the court and further statements of counsel critical of the ruling were not in order.
>
> The Court further finds as a fact that on the following day, July 15, 1975 at 2:55 o'clock p.m. when the court was hearing defense counsel, Jerry Paul, in the absence of the prospective juror Jenny Lancaster, in reference to the

court's ruling on certain questions propounded to said juror by defense Jerry Paul. On that occasion Jerry Paul in a very loud voice stated that the court's rulings were denying the defendant an opportunity to effectively pick good jurors and to return to the method the court was suggesting was to return to a hundred years ago and made absolutely no sense whatever, at which time the court denied the defense counsel the right to ask certain questions in the manner put by defense counsel to which Jerry Paul answered in a very loud voice that any questions the state asked, they were allowed to ask, and the questions he wanted to ask were not being allowed to ask and that the court was showing bias in favor of the State and was not giving to the defense a fair trial. Thereafter, a conversation occurred between the court and the defendant as to the method of asking questions during which time defense counsel, Jerry Paul, stated that the State was taking longer to examine jurors than the defense was taking.

The Court further finds as a fact that this statement as to time consumed by the State was not true at which time Jerry Paul answered that the reason the court was cutting him off was because the defendant was getting an advantage and the court was favoring the State and the court was proceeding in a manner to ensure Joan Little's conviction.

The Court further finds as a fact that the records amply disclose that this was not a true statement at which time the defense counsel, Jerry Paul, in a voice indicating loud anger asked the court to recluse [*sic*] himself because he didn't think that the court was capable of giving Joan Little a fair trial and he didn't intend to sit or stand there and see an innocent person go to jail for any reason and that the court could threaten him with contempt or anything else but it did not worry him, at which time Attorney Jerry Paul instantly turned his back to the court and in a loud voice addressed the News Media and others in the

courtroom and said 'and to sit there and say like the queen of hearts off with the heads, the law is the law, is to take us back one hundred years', whereupon Attorney Jerry Paul then turned back to the court and said that he intended to ask the questions and said in a loud voice, "it is apparent I'm disgusted with the whole matter, whole matter of ever bringing Joan Little to trial anyway'. Thereafter he made further statements and at the completion of these statements the court inquired if he was through he stated 'I am through for the moment but not through for this trial'.

The Court finds as a fact that the statements made by said Attorney Jerry Paul on said occasion were in manner made to disrupt the trial and in an apparent attempt to force the court at that time to find him in contempt of court in order that a mistrial would result.

The Court concludes from the above findings of fact that the above acts of Jerry Paul as set forth in these Findings of Fact are in direct contempt of this court.

The Court further concludes that in order to keep this trial in progress which was necessary in the ends of justice, this Order was delayed until the Joan Little trial had been completed.

Now, therefore, it is ordered, adjudged and decreed that the said Attorney Jerry Paul is in direct contempt of court and he is hereby ordered in punishment therefor to be confined in the common jail of Wake County for a period of fourteen days.

This the 15th day of August, 1975 and 12:10 p.m. o'clock."

Petitioner was then allowed to make a statement during which he indicated he wanted to "get it over with", rather than delaying service. He seemed to agree with the judge that nothing was personal and that no animosity was involved in the contempt citation. Petitioner's law partner then made

several motions which were denied and gave notice of appeal. The trial judge then offered to help counsel with the procedures necessary to test the contempt citation, and instructed the sheriff to allow petitioner his medication and contact lens solution while in the jail. Petitioner remained in jail five days after which he was admitted to bond.

REASONS A WRIT OF CERTIORARI SHOULD NOT ISSUE

1. No writ of certiorari should issue to review petitioner's contention that notice of the episodes constituting the contempt was not given him. On July 14, 1975, petitioner challenged the judge to find him in contempt as a result of an exchange between them. The following day he was given a transcript of the entire episode, and told it was being converted into a finding. The episode involved included, among other things, an unwarranted accusation of bias against the judge:

> ". . . I don't think you are capable of giving Joan Little a fair trial and I don't intend to sit or stand here and see an innocent person to to jail for any reason . . .";

a comparison of the judge with a murderous, fictional tryant:

> ". . . to sit there and to say like the Queen of Hearts off with the heads because the law is the law is to take us back a 100 years";

a charge that the judge was linked to attempts to railroad his client:

> ". . . and we intend to ask these questions. . . . It is apparent that I am quite disgusted with the whole matter, whole matter of ever bringing Joan Little to trial anyway. There has been one roadblock after another and one attempt after another to railroad Joan Little and I am tired of it";

and a haughty, concluding threat to continue:

> "I am through for this moment but not through for this trial".

A week later, petitioner was told he would be cited for contempt because of this episode and near the end of the trial was told he would be able to speak in his defense. He ended up doing so on two occasions. While it is true that the contempt order, when read, went beyond the written notice previously given, the notice of the episode subsumed notice of its loud and disrespectful manner, the only one of these things ever challenged by the petitioner at any stage during this case. Moreover, after the order was read, petitioner was given a second opportunity to speak, of which he availed himself. He did not register surprise at any thing said in the order, claim lack of notice or dispute the judge. Instead, he said it was a badge of honor to have done as he did if it saved his client. The colloquy went as follows:

MR. PAUL: If your Honor pleases . . . could I make a statement?

THE COURT: Yes sir.

MR. PAUL: If your Honor pleases, as I said this morning, my belief in the innocence of this young lady . . .

THE COURT: Very intense

MR. PAUL: Which was reaffirmed by the jury—would have been an emotional and hard matter. Also, I am a student, as I told you—court this morning of non-violence and sometimes we have to say things in order to accomplish social change.

THE COURT: You understand nothing personal between you and me, don't you?

MR. PAUL: Yes sir. And if saying the things in order to make advances in courts and society and create social change, and if doing what I did resulted in Joan Little going free or any way in contributed to that, then I do not

consider time as any dishonor but as a badge of honor and note Dr. King said we turn jail walls into jails of freedom.

THE COURT: All right, thank you very much. . . .

The above indicates that there was adequate notice and that there is no real dispute over this, and accordingly a writ of certiorari should not issue.

2. The reasons given as petitioner's second ones are not wholly clear to respondent, appearing to be a mixture of notice arguments, protected activity arguments, estoppel arguments, and a claim of insufficiency of proof because of the absence of a jury at the time of contempt. However, none seem right and should not provide a cause for this Court issuing a writ of certiorari. First, the United States Court of Appeals was not bound to view the contempt judgment in the same factual way as the North Carolina Court of Appeals (if in fact it did not). While state court constructions of their laws bind federal courts, *Mullaney v. Wilbur*, 421 US 634 (1975), whether or not something can be contempt as a matter of federal constitutional law is a federal legal issue which federal courts are required to redetermine on their own, *Fay v. Noia*, 372 US 391 (1963). Second, the presumption that an Attorney General's staff member did not oppose petitioner's application for certiorari because she agreed with petitioner on the notice issue is incorrect. The undersigned is informed the reason that it was not opposed was that petitioner's former attorney misrepresented the facts about notice to her and was taken at his word. The undersigned is further informed this was because the petitioner misinformed his prior attorney as to the true status of his notice. Accordingly, "we presume" that this is the reason the former attorney no longer represents the petitioner. Finally, there is no requirement that a contempt be in the presence of the jury, *United States v. Schiffer*, 351 F2d 91 (6 Cir 1965). The petitioner's argument concerning constitutional protection for his activities will be discussed under Reason 3. All of the above indicate that petitioner's reasons set out in his numbered

paragraph 2 should not cause the Court to issue a writ of certiorari.

3. No writ of certiorari should issue to review petitioner's assertion that some of the conduct specified in the contempt order was constitutionally protected activity and therefore the order as a whole must fall. This is evidently based on two items in the order mentioned in footnote 11 of the petition—a request to the judge to recuse himself and a statement of petitioner's intent to continue asking the same questions. This is a plainly incorrect argument. Each of the above was immediately connected with contemptous conduct, not isolated from such conduct, as shown by the following the textual sequences:

"MR. PAUL: The only reason I can see Your Honor is cutting us off is because we are gaining an advantage and Your Honor is favoring the state and Your Honor is proceeding in such a manner to insure Joan Little's conviction.

THE COURT: All right, you got that in the record.

MR. PAUL: And at this point we ask Your Honor recluse [*sic*] yourself because I don't think you are capable of giving Joan Little a fair trial and I don't intend to sit or stand here and see an innocent person go to jail for any reason and you can threaten me with contempt or anything else, but it does not worry me.

THE COURT: All right, you got that in the record.

MR. PAUL: And to sit there and say like the Queen of Hearts off with the heads because the law is the law is to take us back a 100 years.

THE COURT: All right.

MR. PAUL: And we intend to ask these questions. Now Your Honor, they can object and you can sustain, but we intend to keep on asking questions in order for the appellate court to rule whether or not they were proper questions, we have to ask the questions. It is apparent I am

quite disgusted with the whole matter of ever bringing Joan Little to trial anyway. There has been one roadblock after another and one attempt after another to railroad Joan Little and I am tired of it. . . ."

In light of the above contexts (and the manner of the speech), the constitutional protection for the content of the two statements involved becomes subordinate. This is a normal incident of contempt law and *Mayberry v. Pennsylvania*, 400 US 455 (1971) and *In Re Little*, 404 US 553 (1973) provide examples of this. Although the judge in each of these cases was a public official and could be criticized, this Honorable Court indicated the judge could not be criticized in a profane or obscene fashion in the courtroom itself during business hours. However, acceptance of petitioner's argument would change this and insulate a lawyer from most contempt charges. Therefore, his third reason should not be honored as a basis for a writ of certiorari.

4. No writ of certiorari should issue on account of Judge Hobgood's making the contempt decision rather than having another judge adjudicate the matter. The law prohibits adjudication by one personally embroiled, see "Contempt Proceedings—Due Process", Annot., 39 L. Ed. 2d 1031, 1040 (1974). However, there is nothing in the record of this case which would support such a conclusion. There is direct evidence that a reasonable amount of good will and mutual respect existed between the parties at the time of petitioner's hearing when the adjudication of contempt became final and the sentence was imposed. In fact, petitioner himself admitted there was nothing personal in the judge's actions. The majority's opinion in the case below (Petition pp A-23, 24) adequately disposes of petitioner's arguments in this regard and no writ of certiorari should issue on account of this argument.

CONCLUSION

Petitioner has shown no basis why a writ of certiorari should

issue to relieve him of the remaining nine days of his sentence. Accordingly, his application for same should be denied.

Submitted as the Brief in Opposition to the Petition for Writ of Certiorari, this the 24 day of September, 1977.

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